[TRANSLATION]

REPORT TO THE CANADIAN JUDICIAL COUNCIL BY THE INQUIRY COMMITTEE APPOINTED UNDER SUBSECTION 63(1) OF THE *JUDGES ACT* TO CONDUCT A PUBLIC INQUIRY INTO THE CONDUCT OF MR. JUSTICE JEAN BIENVENUE OF THE SUPERIOR COURT OF QUEBEC IN **R.** v. **T. THÉBERGE**

JUNE 1996

INQUIRY COMMITTEE REPORT

Inquiry Committee

The Chief Justice of Quebec, Pierre A. Michaud, Chairman

Chief Justice Joseph Z. Daigle of the New Brunswick Court of Queen's Bench

Chief Judge J.-Claude Couture of the Tax Court of Canada

The Honourable Paule Gauthier, P.C., O.C., Q.C.

Nathalie Des Rosiers, lawyer

Counsel

L.-Yves Fortier, C.C., Q.C., and Jean-Sébastien Bernatchez, independent counsel

Gabriel Lapointe, Q.C., counsel for Mr. Justice Jean Bienvenue

François Aquin, counsel for the Inquiry Committee

INQUIRY COMMITTEE REPORT

SUMMARY

In a letter to the Canadian Judicial Council on December 11, 1995, the Honourable Paul Bégin, Minister of Justice and Attorney General of Quebec, requested that a public inquiry be held, pursuant to subsection 63(1) of the *Judges Act*, into the conduct of Mr. Justice Jean Bienvenue in R. v. T. Théberge.

On December 12, 1995, the Honourable Allan Rock, Minister of Justice of Canada, requested that the inquiry asked for by the Attorney General of Quebec be public and consider the ground set out in paragraph 65(2)(*d*) of the Act in addition to those set out in paragraphs (*b*) and (*c*) of the same section, which had been referred to by the Attorney General of Quebec.

The majority of the Committee members, namely Chief Justices Michaud and Daigle and lawyers Paule Gauthier and Nathalie Des Rosiers, recommend that Mr. Justice Jean Bienvenue be removed from office. Chief Judge J.-Claude Couture, dissenting, does not recommend that he be removed.

Pierre A. Michaud, Chairman

Joseph Z. Daigle, Committee Member

J.-Claude Couture, Committee Member

Paule Gauthier, Committee Member

Nathalie Des Rosiers, Committee Member

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REPORT OF INQUIRY COMMITTEE MEMBERS
CHIEF JUSTICE MICHAUD CHAIRMAN, CHIEF JUSTICE DAIGLE,
LAWYERS GAUTHIER AND DES ROSIERS

I. COMMITTEE'S TERMS OF REFERENCE

On December 11, 1995, the Honourable Paul Bégin, Minister of Justice and Attorney General of Quebec, wrote a letter to the Canadian Judicial Council pursuant to subsection 63(1) of the *Judges Act* to request that a public inquiry be held into the conduct of Mr. Justice Jean Bienvenue in *R. v. Théberge*. His letter reads as follows:

Sainte-Foy, December 11, 1995

Jeannie Thomas
Executive Director
Canadian Judicial Council
Place de Ville, Tower B
112 Kent Street, Suite 450
Ottawa, Ontario
K1A 0W8

Dear Ms. Thomas:

As Minister of Justice and Attorney General of Quebec, and in accordance with subsection 63(1) of the Judges Act (R.S.C., c. J-1), I would like the Council to hold a public inquiry into the conduct and remarks of the Honourable Mr. Justice Jean Bienvenue of the Superior Court during the trial held at the Trois-Rivières courthouse in R. v. Tracy Théberge (400-01-002411-940).

I was deeply disturbed by the remarks made by the Honourable Mr. Justice Jean Bienvenue and the conduct denounced by some members of the jury. It seems to me that both his remarks and his

conduct violate paragraphs 65(2)(b) and (c) of the Judges Act (R.S.C., c. J-1).

In particular, the Honourable Mr. Justice Jean Bienvenue was guilty of misconduct when he stated the following:

> ***It has always been said, and correctly so, that when women--whom I have always considered the noblest beings in creation and the noblest of the two sexes of the human race--it is said that when women ascend the scale of virtues, they reach higher than men, and I have always believed this. But it is also said, and this too I believe, that when they decide to degrade themselves, they sink to depths to which even the vilest man could not sink.***
>
> ***Alas, you are indeed in the image of these women so famous in history. The Delilahs, the Salomes, Charlotte Tardif, Mata Hari and how many others who have been a sad part of our history and have debased the profile of women.***
>
> ***You are one of them, and you are the clearest living example of them that I have seen.***
>
> ***At the Auschwitz-Birkenau concentration camp in Poland, which I once visited horror-stricken, even the Nazis did not eliminate millions of Jews in a painful or bloody manner. They died in the gas chambers, without suffering.***

(Verbatim from the tape of the hearing on December 7, 1995)

Moreover, he failed in the due execution of the office of judge when, according to at least three jurors, he met with the jurors in private after the verdict but before sentencing to criticize their verdict. He then allegedly told them not to discuss this meeting outside the jury

room. At the time of his sentence, he confirmed this in the following terms:

> ***Even if I must respect the verdict, and I do, I said that nothing forces me to agree with the basis . . . the rather surprising basis for this verdict, that is, for its content.***

(Verbatim from the tape of the hearing on December 7, 1995)

One of the consequences of such an attitude is evident from the public statement made by juror no. 3, Isabelle Maréchal:

> ***But I certainly wouldn't want to be a juror again, and go through what we went through, in terms of morale, and no, to be told that we were simpletons because of the verdict we gave, no, I would not accept that.***

(Verbatim from the statement of juror no. 3 during the December 8, 1995 edition of Le Grand Journal at 10:35 p.m. on the Quatre-Saisons television network)

You will comprehend as I do that a complete assessment of Mr. Justice Bienvenue's conduct during this trial necessitates a review by the Council.

In the next few days, I will send you the final transcript of Mr. Justice Bienvenue's remarks in the courtroom and the statement made by at least one juror recounting the conversations that the judge allegedly had with them in private.

Yours sincerely,

Paul Bégin

On December 12, 1995, the Honourable Allan Rock, Minister of Justice of Canada, asked that the inquiry requested by the Attorney General of Quebec also consider the ground set out in paragraph 65(2)(*d*) of the Act and that it be public. He wrote the following:

December 12, 1995

The Right Honourable Antonio Lamer
Chairman
Canadian Judicial Council
112 Kent Street - Suite 450
Ottawa, Ontario
K1A 0W8

My dear Chief Justice:

I understand that the Council has received a request from the Minister of Justice and Attorney General for the Province of Québec, Me Paul Bégin, under subsection 63(1) of the Judges Act, for a public inquiry concerning the remarks and conduct of the Honourable Mr. Justice Jean Bienvenue of the Superior Court of Québec in the course of the trial at the Trois-Rivières courthouse of R. v. Tracy Théberge. According to Me Bégin, Mr. Justice Bienvenue's remarks and conduct may have shown that he has become incapacitated or disabled from the due execution of his office for the reasons set out in paragraphs 65(2)(b) and (c) of the Judges Act.

It seems to me that the remarks attributed to the Honourable Mr. Justice Bienvenue, both in the Théberge case and in subsequent media interviews, demonstrate a troubling insensitivity towards women and other elements of Canadian society. I would therefore request, pursuant to subsection 63(1) of the Judges Act, that in addition to the grounds cited by Me Bégin the Council inquire as to whether Mr. Justice Bienvenue has become incapacitated or disabled from the due execution of his office for the reason set out in paragraph 65(2)(d), i.e. by reason of having been placed in a position incompatible with the due execution of that office.

I understand that there may be an appeal in the Théberge case. Nevertheless, the matter is sufficiently important that it seems to me essential for the Council to take immediate action to prepare for an inquiry.

I would also request that the inquiry be public.

I look forward to receiving notice of the Council's nominees to the Inquiry Committee. When I have received that notice, I will be pleased to designate two members of the Bar under subsection 63(3) of the Act.

Yours sincerely,

Allan Rock

c.c. The Honourable Lawrence Poitras
Chief Justice of the Superior Court of Québec

Under subsection 63(1) of the Act, the Council had to commence an inquiry after receiving the requests for an inquiry from the Attorney General of Quebec and the Minister of Justice of Canada. This is the first time since the Council was established in 1971 that a provincial attorney general and the Minister of Justice of Canada have jointly requested an inquiry under subsection 63(1). The Attorney General of Nova Scotia asked for such an inquiry in 1990 in the *Marshall* case. This is the third time that the Minister of Justice of Canada has invoked this provision of the Act.

On January 24, 1996, the Canadian Judicial Council announced the formation of this Inquiry Committee, which is made up of three of its members and two lawyers designated by the Minister of Justice of Canada.

The Committee appointed L.-Yves Fortier as independent counsel. His role was to gather and submit any evidence that he considered relevant and helpful in determining whether Mr. Justice Jean Bienvenue had become incapacitated or disabled from the due execution of the office of judge for any of the reasons set out in paragraphs 65(2)(*b*), (*c*) and (*d*) of the *Judges Act*. The Committee also appointed François Aquin to act as its counsel.

The Council received some fifty complaints about the events in question from various persons and groups and forwarded them to the Committee. The complainants were informed of the opening of the inquiry and were invited to be present.

An inquiry committee in making an inquiry is deemed to be a superior court under subsection 63(4) of the Act, which provides the committee with very broad inquiry powers. The role of such a committee is not to preside over a *lis inter partes* but to actively seek the truth itself. In *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267, at pp. 311-12, Gonthier J., after characterizing the role of the Comité d'enquête of Quebec's Conseil de la magistrature as "*remedial*", stated the following on this point:

> *As I noted earlier, the Comité's mandate is to ensure compliance with judicial ethics; its role in this respect is clearly one of public order. For this purpose, it must inquire into the facts to decide whether the Code of Ethics has been breached and recommend the measures that are best able to remedy the situation. Accordingly, as the statutory provisions quoted above illustrate, the debate that occurs before it does not resemble litigation in an adversarial proceeding; rather, it is intended to be the expression of purely investigative functions marked by an active search for the truth.*

> *In light of this, the actual conduct of the case is the responsibility not of the parties but of the Comité itself, on which the CJA confers a pre-eminent role in establishing rules of procedure, researching the facts and calling witnesses. Any idea of prosecution is thus structurally excluded. The complaint is merely what sets the process in motion. Its effect is not to initiate litigation between two parties. This means that where the Conseil decides to conduct an inquiry after examining a complaint lodged by one of its members, the Comité does not thereby become both judge and party: as I noted earlier, the Comité's primary role is to search for the truth; this involves not a lis inter partes but a true inquiry in which the Comité, through its own research and that of the complainant and of the judge who is the subject of the complaint, finds out about the situation in order to determine the most appropriate recommendation based on the circumstances of the case before it.*
>
> (Emphasis in original.)

The procedural fairness requirements codified in section 64 of the Act have been strictly followed and, in addition, the independent counsel fully disclosed the evidence he intended to file with the Committee to counsel for the judge.

The Inquiry Committee held its hearings at Quebec City on March 4 and 5 and April 3, 4 and 19, 1996. It heard nineteen (19) witnesses. The independent counsel called eighteen (18) witnesses, including some at the request of counsel for the judge. The testimony of Mr. Justice Jean Bienvenue closed the Committee's inquiry; his examination in chief and his cross-examination by the independent counsel lasted almost an entire day. The morning of April 19 was devoted to submissions by counsel. The Committee then reserved its decision.

II. BACKGROUND: TRACY THÉBERGE'S TRIAL

In the fall of 1995, Mr. Justice Jean Bienvenue of the Superior Court of Quebec presided at Trois-Rivières over the jury trial of Tracy Théberge, who was charged with murdering her husband. The trial, which received wide media coverage, lasted five (5) weeks. The jury deliberated for fifteen (15) hours on December 5 and 6 and, at about 9:00 p.m. on the second day, returned a verdict of guilty of second degree murder and recommended that Ms. Théberge serve ten (10) years, the minimum time, before being eligible for parole. After the verdict, Mr. Justice Bienvenue went to meet with the jurors in the room reserved for them.

The next day, December 7, after counsel's submissions on sentencing, Mr. Justice Bienvenue sentenced Ms. Théberge to imprisonment for life with eligibility for parole after no less than fourteen (14) years in prison. During his sentence, the judge made the remarks quoted above concerning women and the Jews who died at Auschwitz, which provoked an outcry in Quebec and elsewhere in Canada. On December 11 and 12, the Justice ministers requested an inquiry. A number of persons and groups then complained to the Canadian Judicial Council or requested an inquiry. This was what the Barreau du Québec did in a December 15 letter from its president, Jocelyne Olivier, enclosing a resolution by the Barreau's General Council dated the same day.

On January 8, the Honourable Lawrence A. Poitras, Chief Justice of the Superior Court of Quebec, instructed the Senior Associate Chief Justice not to give any assignments to Mr. Justice Bienvenue until the Inquiry Committee had disposed of the complaints laid against him.

The *Théberge* case has been appealed. We have therefore taken care during the inquiry and in this report not to prejudice anyone's rights in the appeal proceedings.

III. EVIDENCE

Although the letters by the Attorney General of Quebec and the Minister of Justice of Canada referred specifically to certain remarks by Mr. Justice Bienvenue and his conduct during a meeting with the jurors after the verdict, they called for a full inquiry into his conduct during the trial. The subject of the inquiry has indeed been the judge's conduct throughout the trial, the remarks he made during the trial and the interviews that he then gave to the media.

With very few exceptions, the facts are undisputed. However, this does not mean that they do not sometimes lend themselves to differing interpretations, which we must resolve.

The facts adduced in evidence before this Committee should now be summarized. We have excluded facts or incidents that were not proved or that, considered from an overall perspective, did not seem relevant or significant to us. We will present the facts in chronological order:

(A) Remarks by the judge during the trial;

(B) Meeting of the judge with the jurors after the verdict;

(C) Sentence;

(D) Events that occurred after sentencing.

(A) Remarks by the judge during the trial

1. Remarks to a female juror

"***Kleenex is a woman's best friend***" said Mr. Justice Jean Bienvenue to juror no. 11, who was crying and to whom counsel for the defence had given a tissue. That juror had feared being discharged after she unintentionally heard another juror make racist comments about the accused, a mulatto, in a public restaurant. The juror who made those comments was discharged. Juror no. 11, herself the spouse of a member of a visible minority group, remained on the jury but had difficulty accepting having been involved in such an incident.

Mr. Justice Bienvenue explained that his remarks were made in jest to cheer up the juror, who seemed traumatized to him. As for the juror herself, the judge's comment had little impact since she was so upset about the events surrounding the discharge of the other juror. The judge asserted that he has made the same joke to male witnesses in the past.

2. Remarks about the parking attendant

On November 28, 1995, the start of the hearing was delayed because two jurors were denied access to the courthouse parking lot. Mr. Justice Bienvenue

called the attendant "*an important figure who has the great responsibility of looking after the parking lot*" and stated the following to the jurors in court:

> *You can at least reassure yourselves by saying that the difference between him and you is that you could all do his job, collect the little $2.75 that I pay every morning and give a receipt in return, it's the machine that does the calculation, not his brain. So you can reassure yourselves by saying that you could all do his job, but I'm sure he couldn't do yours, because it requires something above the shoulders.*
>
> (Emphasis added.)

From the bench, the judge "*with much conviction*" ordered the courthouse director, the company that managed the parking lot and the attendant to reserve eleven (11) parking spaces for the jurors every day or else be found in contempt of court. And Mr. Justice Bienvenue went on: "*And if they don't know or he doesn't know what 'contempt of court' means, ask him to come see me and I'll give him a short lesson in the law.*"

3. Remarks to a female reporter

At one point in the trial, Mr. Justice Bienvenue instructed the security guard not to allow those who left the courtroom to re-enter. When court adjourned, Valérie Lesage, a reporter covering the trial for a television network, asked Mr. Justice Bienvenue in the corridor to make an exception for reporters. It seems that the judge agreed to relax his instructions.

Later the same day, according to Ms. Lesage's testimony, when Mr. Justice Bienvenue was about to enter the courtroom for the afternoon sitting, he beckoned to her to come over to him and, taking her aside, said to her:

> *When I saw your miniskirt I said: "You can let her come in and go out as she wishes". It's a joke, you understand that I couldn't say it in public.*

The reporter continued:

> *My reaction was that I was rather surprised, I immediately said something like: "Your joke isn't funny".*
>
> *I turned away and he kept on saying that it was a joke, that he couldn't say it in public. He had a good laugh about it.*
>
> . . .
>
> *I was really very surprised to hear a judge say such a thing. . . .*

Mr. Justice Bienvenue admitted that he essentially made the remarks attributed to him by Ms. Lesage. He explained that he was trying to tell her "*subtly*" to dress differently. Before this Committee, the judge alluded to judicial decorum. He also clearly referred to the reporter's physical appearance and suggested that her attire could have distracted the jurors from their job. There is no evidence that Valérie Lesage's attire was in any way unsuitable. In response to the specific questions put to him, Mr. Justice Bienvenue could not provide a satisfactory explanation of why Ms. Lesage should have understood from his remarks, said "*in jest*", that she should start dressing differently to attend the trial.

4. Remarks about the jury and the accused

The independent counsel called two officers of the court, the jury guard and the crier, to recount certain remarks about the jury and the accused that they claimed Mr. Justice Jean Bienvenue had made to one or the other of them in his chambers.

Decision on an objection to evidence

Counsel for the judge objected to this evidence on the ground that confidential remarks made by a judge in his or her chambers are protected. The objection was dismissed at the hearing and, since the decision on this point was questioned again during oral argument, we will explain the reasons we gave for admitting the evidence.

(i) First of all, counsel for Mr. Justice Bienvenue referred to *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, at p. 1113, in which Dickson C.J. noted that there must be a "*high standard of justice . . . when the right to continue in one's profession or employment is at stake.*" That judgment, which penalized the University's failure to observe the *audi alteram partem* rule, did not deal with the confidentiality of certain communications. As for the general principle referred to by Dickson C.J., its application does not present any problems in this case: the legislative and regulatory controls on the Committee's inquiry and the full disclosure of evidence to the judge in respect of whom the inquiry is being made are themselves the model parameters of a high standard of justice.

(ii) The second argument about why remarks made by a judge in his or her chambers cannot be inconsistent with the office of judge relates to the relevance of the evidence offered. However, since the purpose of the inquiry is to conduct a thorough assessment of the judge's conduct during the trial, anything that can clarify or help in understanding that conduct and the judge's public comments in court or during the proceedings is undeniably relevant, even if it occurred in the judge's chambers (*Phipson on Evidence*, 14th ed., London, Sweet & Maxwell, 1990, paras. 29-01 *et seq.*; *Cross on Evidence*, 7th ed., London, Butterworths, 1990, at p. 27).

(iii) The third argument seeks to claim a privilege, that is, an exemption granted to a witness from having to testify on a matter relevant to the subject of judicial proceedings that are under way. The privilege, which is generally claimed by a witness called to testify, may also be claimed, as in this case, by the person who says the privilege belongs to him or her (*Halsbury's Laws of England*, 4th ed., vol. 17, London, Butterworths, 1976, no. 235, at p. 164). Counsel for the judge did not refer to any authority in support of his claim.

MacKeigan v. *Hickman*, [1989] 2 S.C.R. 796, is the leading case on judicial privileges, namely the privilege applicable to the adjudicative process and that applicable to court administration. The latter privilege protects a judge's communications with court and administrative staff working for the judge when such communications are made in the performance of the judge's official duties. Mr. Justice Jean Bienvenue's remarks about the jurors and the accused's colour and sexual orientation were not made to the witnesses Therrien and Savard as officers of the

court and certainly were not made in the performance of the judge's official judicial duties.

The administrative privilege is a qualified one: the protection it confers may be excluded by a court if it decides that the requirements of an inquiry must take precedence over immunity, and this is all the more true when the inquiry, conducted by a committee of the Canadian Judicial Council, concerns the conduct of a judge. Anticipating such a situation, Lamer J. wrote the following in *MacKeigan* at pp. 806-07:

> *A Chief Justice's reasons for determining who sits on which case needs to be protected from inquiries and for that reason, benefits from the judicial privilege. But, as Cory J. states, it is a qualified privilege. In, but only in, exceptional circumstances this privilege will have to give way to disclosure. In my view, the only situation where this may, but not always, occur, is when an investigation into the conduct or integrity of the Chief Justice or other justices is being conducted.*
>
> *Since this commission of inquiry has no power to investigate into the conduct or integrity of judges, a matter that is for the federally created Canadian Judicial Council, the Commission is not empowered to ask any questions pertaining to the composition of a particular bench and the reasons for which it was set up in a particular manner.*
>
> (Emphasis added.)

In the same decision, Wilson J., at p. 808-09, formulated a proposition that, although she was in the minority in a case that concerned a provincial commission of inquiry, could serve as a guideline in ethical matters:

> *When there is a real risk that judicial immunity may be perceived by the public as being advanced for the protection of the judiciary rather than for the protection of the justice system, the public interest in my view requires that the question be asked and answered.*

Where there is no judicial privilege, it may be possible to find a privilege whose existence is justified by the particular circumstances of the case (*Slavutych* v. *Baker*, [1976] 1 S.C.R. 254, and *R.* v. *Gruenke*, [1991] 3 S.C.R. 263, at p. 288). Be that as it may, it must be recognized that the communications in issue here can in no way meet Wigmore's four criteria (*Evidence in Trials at Common Law*, McNaughton Revision, vol. 8, London: Little, Brown & Company, 1961, para. 2285), which, although not "*carved in stone*", to use the words of Lamer C.J. in *R.* v. *Gruenke*, *supra*, at p. 290, nevertheless provide a recognized framework for assessing the privileges pertinent to this case. The criteria are as follows:

> *(1) The communications must originate in a confidence that they will not be disclosed.*
>
> *(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.*
>
> *(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.*
>
> *(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.*

As regards the first criterion, no assurance was given that the communications would not be disclosed. This is crucial and should dispose of the matter. Moreover, the communications said to have been made by the judge about the jurors and the accused are not connected with the relation that must be maintained between a judge and an officer of the court and certainly do not meet the other three criteria of the proposed test.

(iv) It is clear that officers of the court are undeniably required to be discreet about what they learn in the course of their duties. However, it is important not to confuse the duty to be discreet with the right to confidentiality in a court of law. The principles justify judicial protection of certain types of communications and not, in the absence of a legal rule, the duty to be discreet or even the oath of secrecy of a person who is told something in confidence (Wigmore, *supra*, para. 2286). In addition, while the duty to be discreet is interpreted in its broadest sense, the limits on judicial protection of communications must be strictly defined, the general rule being that any relevant evidence is admissible.

However, contrary to what was argued, it must not be thought that the decision to dismiss the objection, in the exceptional context of an inquiry into the conduct of a judge under the *Judges Act*, will open the door to the ill-considered disclosure of discussions that judges may have with their assistants, secretaries, law clerks or officers of the court. The courts have always exhibited great restraint in considering any request to obtain evidence from judges' assistants, even when it is not privileged. Moreover, since judges have immunity from prosecution, it is not easy to imagine such evidence being sought or deemed relevant outside disciplinary proceedings.

The argument of counsel for Mr. Justice Bienvenue about the confidentiality of communications between lawyers and their secretaries does not appear to shed light on the issue at hand. Of course, a communication to which professional privilege applies is protected. However, a secretary called before a disciplinary committee of the bar association would have to answer (see section 149 of the

Professional Code, R.S.Q., c. C-26). Moreover, a client may waive the solicitor-client privilege, and a privilege from which only the client benefits cannot be raised against him or her. Thus, proceedings involving a lawyer and his or her client may lead to the disclosure of communications that occurred in the lawyer's office between the lawyer and his or her secretary or assistants.

Remarks adduced in evidence

We will now turn to the facts adduced in evidence by the officers of the court.

The jury guard, Alain Therrien, had to go to the presiding judge's chambers to give him a request by the jury for additional instructions. The judge expressed impatience upon reading the note. However, contrary to what the guard testified, the judge asserted that he did not "*curse*" but at most said "*Ah, bien maudit*" [damn it]. In response to the witness Therrien's assertion that he called the jury idiotic and incompetent, Mr. Justice Bienvenue told the Committee the following:

> *I'm not saying either yes or no, because I don't remember. I'm not saying either yes or no, but it's possible that in a moment of impatience I said something that wasn't very flattering, human nature being what it is.*

The accused, who suffered from back pain, borrowed one of the jurors' seat cushions while the proceedings were being conducted without the jury. The next day, a female friend provided her with a cushion. The crier, Roger Savard, reported that when court adjourned Mr. Justice Bienvenue said in front of him that the two women were lesbians and that he wondered which one of them acted as the man.

On another occasion, the judge is said to have referred to the accused, who is a mulatto, as a "*Negress*".

The judge does not remember using the word "*lesbian*" but believes that he actually used the term "*girlfriend*" in the same sense. According to him, he was answering a question by the crier about whether the person who brought the cushion was "a girlfriend", which the judge considered to have a homosexual connotation. He categorically denied saying "*I wonder which one of them acts as the man*".

As for his allegedly calling Ms. Théberge a "*Negress*", Mr. Justice Bienvenue explained that once again he was answering a question by the crier, who asked him whether the accused was white or a "*Negress*".

(B) Meeting of the judge with the jurors after the verdict

When the verdict was given at about 9:00 p.m. on December 6, 1995, after fifteen (15) hours of deliberations, the judge thanked the jurors and told them before they left that he would come to see them once a time had been set for submissions on sentencing. It was quickly agreed that submissions on sentencing would be made the next day and, according to the testimony of counsel for the defence, "*the presiding judge stood up, a little bit angry, and pointed at the jury room, saying: 'I'm going to talk to them'*".

Three members of the jury and the crier, Savard, who accompanied the judge into the jury room, testified about this meeting. Their respective testimony is

consistent and is essentially corroborated by Mr. Justice Bienvenue, although he tried to cast a different light on it. In any event, the jurors were shocked by the judge's criticism of their verdict. Francine Clément answered the independent counsel as follows:

> *"So Mr. Justice Bienvenue came to see us, he started by thanking us.*
>
> *After that he said: "I was not understood. . . ."*

Ms. Clément continued as follows after consulting the notes she made in the days following the incident:

> *That's it, "I was not understood. All the elements required for a first degree verdict", that's it, I had forgotten, he said: "All the elements required for a first degree verdict. All that was missing was a camera to film everything".*
>
> *Oh, yes, he also added: "I can't ever remember deliberations lasting so long in such a case".*
>
> . . .
>
> *And then he also added that as for our recommendation of ten (10) years, we shouldn't delude ourselves.*
>
> . . .
>
> *Right away we were . . . in any event, I was rather flabbergasted.*
>
> *I am not the type of person, when I'm asked to do something, who's going to give an answer that I don't agree with, to be prompted with an answer.*
>
> . . .
>
> *Yes, yes and to me it was clear that if I was asked to be there and give a verdict, give an answer, I gave my answer.*

Isabelle Maréchal, juror:

Well, we were told . . . um . . . that . . . um . . . in his forty years as a . . . member, if you will, of the legal profession, that it was the easiest case but the one that took the longest to deliberate on.

That as he saw it, in this case, if there had been. . . .

That all the elements were there, that he didn't understand why we had opted for second degree.

That all the elements were there, that he could list them. He did list a few for us: the blade, that type of thing.

That the only thing missing for it to be simple would have been cameras.

That if there had been cameras, everything would have been simple.

. . .

Well, I took it as a criticism, as if we hadn't done what we had to do.

That our decision was maybe not the right one, that. . . .

I took it as a criticism.

Charles Pilon, another member of the jury, corroborated the above testimony and described his reaction as follows:

That was the impression: that we had . . . that our sentence was not the correct one, in his view, there was every reason to . . . according to the testimony we had heard and all that, it was a clear case of first degree.

So that was what shocked us.

The crier, Roger Savard, gave similar testimony and, pointing to his throat with his hand, said that Mr. Justice Bienvenue made the following observation:

> *So according to you, she was crazy from there to there. Before that and after that, she wasn't crazy, but from there to there she was crazy.*

Mr. Justice Bienvenue said that he did not consider the meeting secret. He did not notice that the doors of the room had been closed by the crier. In any event, he always meets with the jury after the verdict. He added:

> *I asked them whether my instructions had been sufficiently clear and I mentioned the subjects: section 16, the various verdicts, the planned and deliberate nature of first degree murder, and reasonable doubt.*
>
> *And I told them that if I was asking them, it was because they understood from me that I was really wondering whether I had been clear enough.*
>
> *And I have the distinct impression, although I'm not sure, that given my questions on the matter, they may have realized that I was having trouble reconciling my instructions with their verdict.*
>
> . . .
>
> *No, I don't remember, but it's possible I said that: "The only thing missing was a camera".*
>
> *And it shouldn't come as a surprise if I used that expression or something of the kind, it shouldn't be surprising if they realized, say, at least that I was surprised by the verdict and I didn't act as a hypocrite.*
>
> *The next day, in open court, I commented on their verdict when I sentenced the accused.*
>
> *I commented on their verdict in that I said I was having trouble understanding, grasping the basis for that verdict.*

. . .

I was not short-tempered, I was not angry, I was . . . my attitude, my conduct expressed surprise much more than anger.

It was not a question of heaping criticism on them, but let's say that they may not have seen unbridled enthusiasm and excitement from me, but mind you, I may not have been feeling much more, saying to myself: you'll do better the next time, old man, or you'll try to be clearer the next time.

. . .

. . . I made it clear to them that I was in no way bound by any such recommendation.

Because if a judge were bound, the judge would no longer have much to do in such a case.

It would then be the jurors who gave the verdict and sentenced the accused.

So I said as a joke, although I don't remember it, Mr. Lapointe, I said in jest something like "don't delude yourselves" or something like "I don't feel bound by your decision", but I didn't say "you're deluding yourselves".

At most I may have said: "Don't delude yourselves, OK, if you think I feel bound".

Mr. Justice Bienvenue acknowledged that the jurors "*were very tired and emotional*" that evening, after such a day. He even said: ". . . *when I went into the jury room, tears were still being shed*".

Finally, it should be recalled that Isabelle Maréchal, juror no. 3, made a public statement to a television station on December 8, 1995, a statement to which the Minister of Justice of Quebec referred in his December 11 letter:

> *But I certainly wouldn't want to be a juror again, and go through what we went through, in terms of morale, and no, to be told that we were simpletons because of the verdict we gave, no, I would not accept that.*

(C) Sentence

At about noon on December 7, 1995, after the submissions on sentencing, Mr. Justice Bienvenue sentenced the accused. In his sentence he criticized the verdict, which he said he respected "*sacredly*" but the basis for which he could not understand. During sentencing, the judge said the following to the accused:

> *IT HAS always been said, and correctly so, that when women--whom I have always considered the noblest beings in creation and the noblest of the two sexes of the human race--it is said that when women ascend the scale of virtues, they reach higher than men, and I have always believed this. AND it is also said, and this too I believe, that when they decide to degrade themselves, they sink to depths to which even the vilest man could not sink.*
>
> *ALAS, YOU ARE indeed in the image of these women so famous in history: the Delilahs, the Salomes, Charlotte Corday, Mata Hari and how many others who have been a sad part of our history and have debased the profile of women. You are one of them, and you are the clearest living example of them that I have seen.*
>
> *AT THE Auschwitz-Birkenau concentration camp in Poland, which I once visited horror-stricken, even the Nazis did not eliminate millions of Jews in a painful or bloody manner. They died in the gas chambers, without suffering.*

. . .

Animals themselves--your cat, for example--never sink to such depths as you have. Animals kill for food in accordance with the secular rules of nature, but they never kill out of pure cruelty.

. . .

AND in my view, as in the view of doctors Veillette and Gagné, your earlier announcements of suicide, of false suicide, were a complete farce. You should know, if you are not aware of it, that those who really commit suicide do not announce what they are going to do but actually take action. And when they do so, "they take no chances", if you'll pardon the expression. They use sharp blades and they actually press down, as you did successfully to the man that you said you loved so much when you killed him like a coward.

Mr. Justice Bienvenue was reading from a handwritten text that he had started to write the day before, but which was the result of several hours of thinking and some earlier drafts. He answered the independent counsel as follows:

Q. Mr. Justice Bienvenue, would the Committee members be correct in thinking that what you wrote in the sentence, upon giving the matter some thought, represents your personal beliefs?

A. If I had acted otherwise, if I had written something other than my personal beliefs, I would have acted improperly as a judge and I would not have complied with the oath that I took.

The trial received wide media coverage. Within hours the broadcast media had aired the statements about women and the Jews who had died at the Auschwitz concentration camp.

(D) Events that occurred after sentencing

The day after sentencing, Mr. Justice Bienvenue's office began to be flooded with telephone calls from media across the country. About 132 calls were received during the following days.

On December 8, the judge gave three interviews, two to television stations and one to newspaper reporter Claude Arpin of *The Gazette*.. He also talked on the telephone with Claude Savary of the Trois-Rivières newspaper *Le Nouvelliste*. We note that the only real surprise the judge expressed related to the incompleteness of his remarks on women: his comment that women rise higher than men in the scale of virtues was not quoted. Mr. Justice Bienvenue therefore hastened to set the record straight. In an interview with the Canadian Broadcasting Corporation, he was careful to read what he had said the day before about women and Jews in full on the air. He gave Claude Arpin a copy of the same passage, which he had asked his secretary to type using the handwritten draft of the sentence.

It is clear from the evidence and Mr. Justice Bienvenue's own explanations that on December 8, 1995, the day after he sentenced the accused, he stood by his remarks concerning women and the Jews who had died at Auschwitz. He did not wish to retract any of his remarks and he felt no need to apologize in any way. Before this Committee, Mr. Justice Bienvenue answered the independent counsel's questions as follows:

> *Q. And I ask you: at that time, namely less than twenty-four (24) hours after sentencing, did you still feel that you had the right*

to disseminate your views on women, your thoughts about the Auschwitz concentration camp from the bench, as you had done the day before?

A. *Answer: yes.*

Q. *Very well.*

And moreover, you continued by saying, Ms. Germain [Canadian Broadcasting Corporation reporter]:

> *And he does not regret his words at all.*

And then we heard you say:

> *I stand by the . . . in life, in judgments, I rarely make--and I am speaking as a judge--comments . . . what was I going to say? . . . I still stand by the words that I used and . . . that I believed, that I had thought about.*
>
> *And if some people misunderstand them or want to misunderstand them, I can't do anything about it.*

A. *That's right, that's what I said and it's still what I think, Mr. Fortier.*

On December 12, 1995, Mr. Justice Jean Bienvenue met by invitation with the leaders of the Canadian Jewish Congress. The following joint statement was issued after that meeting:

> *After a cordial meeting between Canadian Jewish Congress officials, representatives of the Holocaust Memorial Centre and myself, I would like to state the following: first, I sincerely regret the pain that my comments caused last week, particularly to Holocaust survivors. As is generally recognized by everyone, the horrors of the Holocaust are unparalleled in human history. That is why I recognize the inappropriateness of the analogy I drew with the Holocaust to illustrate a situation I perceived as extreme. I would also like to apologize to everyone who felt offended by that analogy.*

The leaders of the Canadian Jewish Congress said that they were satisfied with the judge's apology, although they continued to disagree strongly with his remarks. They did not withdraw the request they had made to the Canadian Judicial Council for an inquiry.

Before both the Canadian Jewish Congress representatives and this Committee, Mr. Justice Bienvenue referred to the Larousse dictionary in making what he himself called a "*subtle*" distinction between "*pain*", which he said is physical in nature, and "*suffering*". According to him, it was in this sense that he referred in his sentence to certain murders that, in his view, cause less physical pain than others:

> *THE USE by other murderers of gunshots or poison or suffocation to kill their victims means that at least those other victims die without pain.*

Whatever may be thought of this semantic explanation of the supposedly literal meanings of these terms, Mr. Justice Bienvenue used both terms in his remarks about Jews:

> *. . . even the Nazis did not eliminate millions of Jews in a painful or bloody manner. They died in the gas chambers, without suffering.*
> (Emphasis added.)

Three leaders of the Canadian Jewish Congress testified at the inquiry. They said that they were satisfied after hearing Mr. Justice Bienvenue that he was in no way malicious or anti-Semitic. On the other hand, it is clear that the Jewish community was offended, and rightly so, and that its members were deeply distressed by the remarks in question. The judge apologized and said that he regretted those

remarks because he does not like to upset anyone. However, we cannot help but note that he still believes what he said. He gave the following answer to a question by the independent counsel:

> *Q.* *. . . did you then feel that you should not, that as a Superior Court judge you should not have made those comments about Auschwitz on December 7?*
>
> *A.* *I have the impression that I didn't make myself understood.*
>
> *I said earlier that I believed the remarks I made, because if I, or any of my colleagues, was going to say things from the bench that I don't believe, that are contrary to my thinking, that would be a serious breach of my duties.*

With respect to women, Mr. Justice Bienvenue explained to this Committee that after meeting with the leaders of the Canadian Jewish Congress, he said to himself:

> *. . . well now, it's time to turn my attention to the women of Quebec and to prepare an apology, after giving the matter some thought.*

On December 15, he therefore provided the media with a statement that included the following passage:

> *Among the observations I made at the time to justify my respect for these criteria, there are two that have received particular attention: the first was my analogy with the death of millions of Jews during the horrific and unforgettable Holocaust and the other was my personal, and very sincere, opinion about the great virtue of women within the human race.*

> *After meeting with representatives of the Canadian Jewish Congress and apologizing for the unfortunate analogy I made with the Holocaust to illustrate a situation I perceived as extreme, I wanted to issue this news release to clarify my position on my comments about women.*
>
> *First of all, I want to apologize to all women who may have been shocked or offended by my statements and I hope that they will accept my apology. The comments I made when rendering judgment were in no way intended to belittle women, quite the contrary. I tried, albeit in an inappropriate way, to show how shocking and horrible I considered the crime committed by the accused. Those who have been firsthand witnesses to the justice I have administered for many years know how I have done so and how much respect my judgments have shown for women.*

In his news release, Mr. Justice Bienvenue expressed a wish to meet with representatives of the Fédération des femmes du Québec "*to have a discussion with them*". In the opinion of Françoise David, the president of the Fédération des femmes du Québec, the judge had not given serious consideration to his statement. She said the following on this point before this Committee:

> *But nowhere in the news release can one sense any contemplation--especially since he had eight (8) days to do so--any deep, significant contemplation that would have led him to say: "This is why my remarks did not hold up, why my remarks did not make sense, and this is why my remarks were sexist and I understand a certain number of historical and factual problems and problems concerning the place of women and men in society".*
>
> *There was nothing of the kind.*
>
> *So we said: "It's not really very serious".*

Mr. Justice Bienvenue testified that if the meeting with the Fédération des femmes du Québec had taken place, he was prepared "*to add more to my apology*". However, he was not interested in a history lesson. Moreover, in his view the

representatives of women's movements who were heard as witnesses, including Diane Lemieux, co-ordinator and spokesperson for the Regroupement québécois des centres d'aide et de lutte contre les agressions à caractère sexuel, and Françoise David, president of the Fédération des femmes du Québec, were not validly authorized to speak on behalf of the organizations in question. The judge claimed to have privileged access to the average Canadian, who, in his view, would completely approve of his comments about women. In this regard, he filed in evidence a folder containing letters of support from various persons.

Mr. Justice Bienvenue said that his ideas about women were taught to him by his mother sixty (60) years ago and by a Jesuit teacher fifty (50) years ago when he was in college. To show that such assertions were common in the last century, the judge submitted the following extract from Benoîte Groult's book *Cette mâle assurance* (Paris, Éditions Albin Michel, 1993):

> *Men are often not as bad as their ideas; women, who are more logical, take their ideas to their furthest extremes; they are superior in virtue and more degraded in vice. When the schools that are intended to be established have turned out several generations of atheist, revolutionary women, the Republic will not be any more sounder, but on the contrary, the social order will be terribly weakened as a result.*
>
> Le Monde, 1880.

Mr. Justice Bienvenue testified as follows about this 1880 publication quoted by Ms. Groult (it is not the current newspaper *Le Monde*, which was established in 1944):

> *Well, of course, eighteen eighty (1880) is eighteen eighty (1880).*
>
> *But it is one of those truths or values, those traditions that are much older, that are timeless, if I may say so.*

> *And I want to use as an example a collection of stories [Les Fables de La Fontaine] that I am rereading.*
>
> . . .
>
> *La Fontaine's fables are much older than the newspaper Le Monde and they continue to hold, to express values and concepts that are still valid, unless the world changes a lot.*

According to Benoîte Groult, the purpose of her book was to gather "*judgments and anathema, decrees and sentences, curses and denunciations by* [men] *against* [women] *since the beginning of time. . . .*"

At the inquiry, Mr. Justice Bienvenue stated for the first time that the handwritten draft of the sentence included the word "*sometimes*" in the statement about women who degrade themselves. He omitted this word when delivering the sentence: "*I skipped it*" he told the Chairman of the Inquiry Committee. He also left it out the following day when he read the sentence on the CBC. It is true that the word "*sometimes*" appears in the extract given to reporter Claude Arpin on December 8, but that extract had, at the judge's request, been typed by his secretary using the handwritten copy. The argument that the elevation of women is the principle--"*unconditional praise of women*"--while their abasement is merely the exception appears to be an interpretation developed after the fact. Even if it were accepted, it makes very little or no change in the meaning of the judge's remarks that this Committee must evaluate.

The fact that Mr. Justice Bienvenue apologized does not mean that he acknowledged any error on his part. He testified before this Committee as follows:

> *Q. And Mr. Justice Bienvenue, today, namely the fourth (4th) of April nineteen ninety-six (1996), your personal beliefs on this matter, which are, as you told us yesterday, the product of your upbringing by your mother sixty years ago;*
>
> *Your education by Father Chartier fifty years ago, have not changed?*
>
> *A. Not at all.*
>
> *And if they had changed before my sentence, I would not have made those remarks during sentencing.*
>
> *If they had changed since, with the outcry that we have read and because of that outcry, that wouldn't be very serious on my part; what I heard yesterday from certain witnesses has not at all changed my profound beliefs on this matter.*
>
> *I want to remind you of the distinction I made earlier about the very important difference between characteristics and the similarity or analogy between two things, two beings.*

Later, the independent counsel drew the judge's attention to the risk involved in conveying sexist stereotypes:

> *Q. And do you agree with me that judges in particular should take care not to convey these sexist stereotypes because their attitude, given the influence that judges have, the power that they have, because their attitude may be cited as an example?*
>
> *A. I understand what you mean. That follows upon everything that we have just said and the answers I have given you, Mr. Fortier.*

But I maintain that you can't . . . I'm sorry, but you can't take the idea away from me, I believe it deeply in my heart based on many examples in modern and ancient history.

You won't take from me the idea of the immeasurable respect that I have for women with, alas, alas, exceptions that occur sometimes, to use the word that I used.

And listen, I think I said it yesterday: out of the one hundred and twelve (112) serious crimes tried before me, one hundred and four (104) were committed by men.

In closing the inquiry, the Chairman of the Committee asked Mr. Justice Bienvenue the following question:

Q. And don't you see a problem in applying these Charter rights while believing what you continue to believe, that:

> ***When they decide to degrade themselves, they sometimes sink to depths to which even the vilest man could not sink.***
>
> *You don't see any conflict between these two concepts, between equality and that thinking?*

A. No, and I will explain why, Mr. Chairman.

> *Because, exactly, the concept of equality above all concerns, it's necessary to look at the relevant sections of the Charters one by one, above all concerns the rights that every human being or citizen has in our country or in our province, because there is the Quebec Charter of Rights too, among rights and obligations, the most classic examples are race, colour, religion, et cetera, and sex too, I think sex is mentioned.*
>
> *So equality, that's what it is, and I respect it and it's my sacred duty to respect this Charter or I cannot hold the office that I hold.*

But when I spoke of similarity, that is something entirely different and there are works that are much more scientific than the one I'm going to refer to.

There are medical works that are much more scientific than the Petit Larousse dictionary.

But the Larousse itself says--I would have brought it with me if I'd known that the question would be asked--the Larousse itself says that men and women are, in their physical makeup and characteristics, the word is "physiological" or something like that, are essentially different and. . . .

Q. *But that. . . .*

A. *Yes, I don't want to give you a lesson. . . .*

Q. *We won't engage in a long discussion of that today.*

A. *No, no, the word "equality", "equal or equality or to equal", in our dictionaries, now, there is clearly every difference in the world from similarity or analogy.*

Similarity is--you have twins who are alike, that's a good illustration of the comparison.

Equality has to do with something entirely different, which, I say, is above all the aspect of rights.

The equality of everyone before the law is the equality of every individual, male or female.

But I could have two different people in front of me who will be equal without being similar, without being alike.

Finally, on January 3, 1996, a letter entitled "*True contempt for suicidal persons*" appeared in the newspaper *Le Soleil*. That letter by Sylvaine Raymond, the co-ordinator of the Association québécoise de suicidologie, denounced the myth conveyed by the sentence that persons who commit suicide do not announce what

they are going to do. On the contrary, the research is clear: "*most suicidal persons state what they intend to do before they take action*". Ms. Raymond concluded as follows with respect to the implications of Mr. Justice Bienvenue's remarks:

> *His remarks set suicide prevention back ten (10) years and show the insensitivity of a man who knows nothing of what he is talking about.*

Luc Vallerand testified for the Association québécoise de suicidologie and filed an information package on the problem of suicide. That document encourages people to take any reference to suicide or death seriously. On cross-examination, counsel for Mr. Justice Bienvenue filed an extract from a newspaper in which an artist talked about the suicide of a close relation who had not announced what he was going to do. This in no way contradicts the observation that suicidal persons generally announce their intentions.

In testifying on this question, Mr. Justice Bienvenue explained that he had spoken in the context of the trial over which he was presiding: he was referring to the testimony of psychiatric expert Pierre Gagné, who, in his view, had concluded that the accused's suicide attempt was feigned. However, Mr. Justice Bienvenue stated the following before this Committee in much more general terms:

> *I wanted to indicate--and this is what I said or some of what I said--that when people really want to commit suicide, to take their lives--and I emphasize the word "really"--well, they don't tell everyone around them, especially if they want to succeed.*
>
> *Likewise--you'll tell me my reasoning is simplistic.*

> *But people who are going to commit armed robbery or murder rarely notify the media or the police in advance about the time, place and victim, unless they don't want their crime to succeed.*

This testimony restates the judge's personal view, already expressed in the sentence, that "*those who really commit suicide do not announce what they are going to do but actually take action*". As regards the testimony of Dr. Pierre Gagné, it contained no such general statement or assertion that suicidal persons never announce that they are going to commit suicide.

IV. TEST FOR REMOVAL

The security of tenure of judges is ". . . *the first of the essential conditions of judicial independence*. . ." (*Valente* v. *The Queen*, [1985] 2 S.C.R. 673, at p. 694). Thus, British judges hold office during good behaviour in accordance with a custom that dates back to 1688 and acquired force of law in 1701 with the passage of the *Act of Settlement*. Only one judge has been removed by the Parliament of the United Kingdom since 1701.

Section 99 of the *Constitution Act, 1867*, which is modelled on the English statute, provides as follows: ". . . *the Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons*". Since 1867, this method of removing a superior court judge has been used by Parliament only five times. The first four cases occurred in the nineteenth century; in the fifth--the *Landreville* case in 1966-67--the judge resigned. None of these five cases reached the stage of a parliamentary vote.

Section 65 of the *Judges Act* provides as follows:

> *(1) After an inquiry or investigation under section 63 has been completed, the Council shall report its conclusions and submit the record of the inquiry or investigation to the Minister.*

(2) Where, in the opinion of the Council, the judge in respect of whom an inquiry or investigation has been made has become incapacitated or disabled from the due execution of the office of judge by reason of

(a) age or infirmity,
(b) having been guilty of misconduct,
(c) having failed in the due execution of that office, or
(d) having been placed, by his conduct or otherwise, in a position incompatible with the due execution of that office,

the Council, in its report to the Minister under subsection (1), may recommend that the judge be removed from office.

In enacting this section, Parliament set out four reasons for which a judge may be made or may become incapacitated or disabled from the due execution of the office of judge. Like Mr. Justice B.L. Strayer of the Federal Court in *Gratton* v. *Canadian Judicial Council* (Ontario, No. T-546-94, May 18, 1994), we do not think that Parliament thereby intended to add anything to the general cause of removal that can be inferred from the constitutional provision in section 99: the breach by a judge of the obligation of good behaviour in the execution of his or her office. There is therefore no need to rule on the constitutionality of paragraph 65(2)(*d*), this question having been raised by counsel for the judge in the event that we found that this paragraph created an autonomous ground for removal.

In his 1981 report to the Canadian Judicial Council, *Masters in Their Own House*, Chief Justice Deschênes stated the following at p. 116: "*It is well-nigh impossible to put into words just what is not "good behaviour". The unpredictability of human conduct will always confound statutory criteria, however carefully drafted.*" The general nature of the concept has therefore led to the development of a general test for applying it. According to Professor Martin L. Friedland, the author of the

report *A Place Apart: Judicial Independence and Accountability in Canada*, Canadian Judicial Council, 1995, at p. 80, the destruction of public confidence should be the basis for such a test:

> *No doubt the courts will adopt a general test that can be applied to a variety of cases. I personally like the one suggested by Sir William Anson that Parliament "may extend the term [good behaviour] so as to cover any form of misconduct which would destroy public confidence in the holder of the office."*

To analyze the evidence and reach our conclusions in this case, we will rely on the test proposed by the Inquiry Committee of the Canadian Judicial Council in the *Marshall* case. The members of the Inquiry Committee, who were unanimous on this point, stated the following about the reasons underlying the proposed test:

> *Everyone holds views, but to hold them may, or may not, lead to their biased application. There is, in short, a crucial difference between an empty mind and an open one. True impartiality is not so much not holding views and having opinions, but the capacity to prevent them from interfering with a willingness to entertain and act on different points of view. Whether or not a judge was biased, in our view, thus becomes less instructive an exercise than whether or not the judge's decision or conduct reflected an incapacity to hear and decide a case with an open mind.*
>
> . . .
>
> *The standard, in our view, must be an objective one based in part, at least, on conduct which could reasonably be expected to shock the conscience and shake the confidence of the public as opposed to conduct which is, and often must be, unpopular with part of that public.*

The test we would propose to apply, as applicable to this case, is an alloy of these many considerations and takes the following form:

> *Is the conduct alleged so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?*

Accordingly, we must now answer the following questions:

1. Has Mr. Justice Jean Bienvenue contravened paragraph 65(2)(*b*), (*c*) or (*d*) of the *Judges Act*?

2. If so, has he thereby become incapacitated or disabled from the due execution of the office of judge?

V. SUMMARY OF COUNSEL'S SUBMISSIONS

Independent counsel L.-Yves Fortier reviewed the evidence he had chosen to submit to us in detail, setting out the questions he felt were relevant on each point and indicating what needed to be considered. He concluded his submissions as follows:

> *I respectfully submit to you that it is only by considering all the aspects of Mr. Justice Bienvenue's conduct in the Théberge trial that we have adduced in evidence that you can form an enlightened opinion on the crucial issue before you. You may conclude that none of the grounds considered separately would entitle you to come to the very harsh conclusion contemplated by subsection 65(2) of the Act. However, is it not reasonable to conclude that public confidence in the impartiality and integrity of the judicial role has been undermined or eroded by all the misconduct alleged against the Honourable Jean Bienvenue, such that he has now become incapacitated or disabled from executing the office of judge?*

Gabriel Lapointe, counsel for Mr. Justice Jean Bienvenue, made submissions concerning the evidence that had been adduced. In particular, he noted that the judge's remarks about the victims of Auschwitz had been made in good faith and without malice or anti-Semitism. According to Mr. Lapointe, the judge's remarks about women were also made in good faith as a result of his upbringing and education. Counsel asked this Committee "*not to forget the positive aspect of the main sentence* [the elevation of women] *and the exception mentioned in the secondary sentence* [their abasement]". As regards the visit to the jurors, counsel for Mr. Justice Bienvenue noted that it was not made in secret: the judge also repeated his comments the next day in court when sentencing the accused. Counsel stressed that a mere error in judgment cannot justify removing a judge and argued that the same

is true of unfortunate or politically incorrect comments, which do not in themselves amount to misconduct serious enough to merit such a penalty.

According to Gabriel Lapointe, there is no evidence before this Committee concerning the public's level of confidence, apart from the poll that he himself filed when the inquiry was reopened.

In closing, counsel for Mr. Justice Bienvenue argued that "*strong language alone, without malice, even when that language can be attributed to ignorance, negligence or tactlessness, does not amount to bad behaviour under s. 99 of the Constitution. . . .*" He said that in the case at bar, the strong language in question was not serious enough to fall under paragraph 65(2)(*b*) of the Act, nor could it place the judge in a position incompatible with the due execution of his office within the meaning of paragraph 65(2)(*d*). He also cited many American decisions in support of his arguments.

VI. CONCLUSIONS

Mr. Justice Jean Bienvenue, who is 67 years old, has been a judge on the Superior Court of Quebec since 1977 and a supernumerary judge for the past two years. He was called to the Bar in 1952 and then practised as a lawyer and also worked for the Crown for six years. He was a member of the Quebec National Assembly from 1966 to 1976 and, starting in 1971, was successively Minister of State (Finance), Minister of Immigration and Minister of Education.

We will focus on two main aspects of the evidence that was adduced: the judge's comments to the jurors after their verdict and the remarks he made about women when delivering the sentence, to the media and to us at the inquiry. This does not mean that we will disregard other evidence that should be reviewed because of its relevance to this inquiry.

Meeting with the jurors

It did not seem necessary for the purposes of our report--and also because the *Théberge* case is being appealed--to deal with Mr. Justice Jean Bienvenue's criticisms of the verdict in his sentence.

As for the judge's remarks to the jurors in the jury room on December 6, 1995, they were unquestionably criticisms and the jury members rightly perceived them as such. Mr. Justice Bienvenue denied that he had acted in secret. When

questioned about the jurors' surprise at his criticism of their verdict, he answered as follows:

> *Perhaps they were surprised, perhaps, but if so, their surprise lasted just a few hours, because the next day, from the bench, I spoke about the verdict in terms that couldn't have been any clearer.*

The fact that the criticisms were repeated in court in no way diminishes the seriousness of the judge's actions, the true implications of which he does not seem to grasp. In his view, there is no clear distinction between the comments on the verdict that he felt himself entitled to make in the sentence and the criticisms that he made directly to the jurors at a meeting the purpose of which was supposed to be to thank them.

The jury is a fundamental institution in our justice system. It "*is one of the great protectors of the citizen because it is composed of twelve persons who collectively express the common sense of the community*" (*R.* v. *Morgentaler*, [1988] 1 S.C.R. 30, at p. 77). In addition to the interests of individuals, the jury also serves the interests of society as a whole. In *R.* v. *Turpin*, [1989] 1 S.C.R. 1296, at pp. 1309-10, Wilson J. described how the institution serves collective interests in the following terms:

> *The jury serves collective or social interests in addition to protecting the individual. The jury advances social purposes primarily by acting as a vehicle of public education and lending the weight of community standards to trial verdicts. Sir James Stephen underlined the collective interests served by trial by jury when he stated:*
>
> *. . . trial by jury interests large numbers of people in the administration of justice and makes them responsible for it. It is difficult to over-estimate the importance of*

> *this. It gives a degree of power and of popularity to the administration of justice which could hardly be derived from any other source. (J. Stephen, A History of the Criminal Law of England (1883), vol. I, at p. 573.)*

The jurors' task is unquestionably an onerous one and it is certainly highly inappropriate to add to it. In *R.* v. *Sims*, [1992] 2 S.C.R. 858, at p. 867, McLachlin J. wrote the following:

> *The jury system places a heavy responsibility in the hands of jury members. Individuals are asked to make grave decisions bearing upon the rights and liberties of their peers. It is a burden which may prey heavily on the minds of some.*
>
> (Emphasis added.)

In *Morgentaler*, *supra*, at p. 78, Dickson C.J. noted the following:

> *We cannot enter the jury room. The jury is never called upon to explain the reasons which lie behind a verdict.*
>
> (Emphasis added.)

In the course of the trial, and in front of the officer of the court who was guarding the jury, Mr. Justice Bienvenue called the jury "*idiotic and incompetent*" or, if not that, then "*something that wasn't very flattering*", to use his own words. Without drawing any conclusion as to how such an incident would be characterized in ethical terms if it were an isolated occurrence, it is certainly inappropriate for a judge to refer to a jury in such a manner.

Moreover, it is totally unacceptable for a judge to question the jurors after the verdict, express his or her "*surprise*" to them and suggest that their verdict was clearly unreasonable. Such conduct is disrespectful of the jury. It very likely has

the dual effect of causing the jurors anxiety and ensuring that they never again want to play a role in such an institution. The statement made by one juror the day after the incident should be recalled:

> *But I certainly wouldn't want to be a juror again, and go through what we went through, in terms of morale, and no, to be told that we were simpletons because of the verdict we gave, no, I would not accept that.*

We therefore conclude that Mr. Justice Jean Bienvenue was guilty of misconduct and failed in the due execution of the office of judge, thus violating paragraphs 65(2)(*b*) and (*c*) of the *Judges Act*.

Remarks about women

In sentencing Tracy Théberge, Mr. Justice Jean Bienvenue made remarks about women that, according to him, were relevant to sentencing and also represented his deepest beliefs. He repeated those remarks, which he had also restated in the media, before this Committee at the hearing. He did not retract any of them but, on the contrary, expressed his conviction that he was right and had wide support among the public. We will reproduce the relevant part of the sentence:

> *IT HAS always been said, and correctly so, that when women--whom I have always considered the noblest beings in creation and the noblest of the two sexes of the human race--it is said that when women ascend the scale of virtues, they reach higher than men, and I have always believed this. AND it is also said, and this too I believe, that when they decide to degrade themselves, they sink to depths to which even the vilest man could not sink.*

> *ALAS, YOU ARE indeed in the image of these women so famous in history: the Delilahs, the Salomes, Charlotte Corday, Mata Hari and how many others who have been a sad part of our history and have debased the profile of women. You are one of them, and you are the clearest living example of them that I have seen.*

Diane Lemieux, co-ordinator and spokesperson for the Regroupement québécois des centres d'aide et de lutte contre les agressions à caractère sexuel, called these statements "*unqualified comments and clichés*". Françoise David, president of the Fédération des femmes du Québec, stated the following before this Committee:

> *Actually, what I said was that those remarks reflect a viewpoint that is, first of all, historically false, negative and extremely sexist towards women.*
>
> *I also said that women--in fact, women and men don't have--there is no need to create some kind of competition in wickedness or vileness between women and men.*
>
> *Like men, women are human beings who may be capable of kindness and generosity, just as both men and women may also be capable of wickedness, pettiness and envy.*
>
> . . .
>
> *And so I tried to ensure that my comments were balanced, but above all to stress that women basically refuse to be treated differently than men.*
>
> *That means we no longer want to be put on a pedestal or, when we make mistakes and even commit crimes, to be treated as the most contemptible of women and as if we were viler than even the vilest man.*
>
> *In either case, it does not correspond to women's reality.*

In our opinion, the judge's statements convey a sexist stereotype that both idealizes and demeans women. Women are human beings and full members of society, and they rightly reject the sort of exclusion that would banish them from reality to a situation of impossible otherworldliness or demonic malignity. Such a cliché establishes two classes of individuals before the courts: men, who, since they are less elevated, supposedly do not fall as far, and women, who are subjected by such an idea to a more exacting standard of conduct and whose offences, which may or may not be more serious, would deserve more severe punishment.

Such a view conflicts with the guarantee of equality before the law recognized by section 15 of the *Canadian Charter of Rights and Freedoms* and section 10 of the *Charter of human rights and freedoms*. As Wilson J. noted in *Turpin*, *supra*, at p. 1329, the guarantee of equality before the law in s. 15 of the *Canadian Charter of Rights and Freedoms* is a "*value . . . associated with the requirements of the rule of law that all persons be subject to the law impartially applied and administered*".

Judges are, of course, entitled to their own ideas and need not follow the fashion of the day or meet the imperatives of political correctness. However, judges cannot adopt a bias that denies the principle of equality before the law and brings their impartiality into question. In an article entitled "*Judicial Free Speech and Accountability: Should Judges Be Seen But Not Heard*" (1983), 3 *N.J.C.L.*, at p. 227, Professor A. Wayne MacKay wrote the following:

> *To argue that the speech of judges should be limited by legitimate claims of equality expressed by lobby groups espousing the claims of*

> *those embraced by the equality guarantees of section 15 of the Charter and by Human Rights Codes is not to argue that judges must be "politically correct" in their speech. Judges should not respond to a public interest lobby just because it is persistent and in vogue. Judges should, however, take care that neither their speech nor conduct transgress the equality principles enshrined in the Charter. When they do commit such transgressions, they should be held accountable. The Charter provides the buoy to prevent the judiciary from allowing lobby groups to pull them down into the political waters.*

In this case, the judge's view of women is a bias that is deeply rooted in his mind. At the inquiry, he clearly gave us the message that he will not abandon that view. The concepts of "*bias*" and "*impartiality*" are clearly opposed. Le Dain J. defined impartiality as follows in *Valente*, *supra*, at p. 685:

> *Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial" as Howland C.J.O. noted, connotes absence of bias, actual or perceived.*
>
> (Emphasis added.)

Because of his ideas about both women and men, Mr. Justice Bienvenue's impartiality in the execution of his judicial office has legitimately been called into question.

Impartiality is the very essence of the judicial office. According to John Locke, the adjudication of disputes by neutral judges is the most important benefit of civilization (cited in Peter W. Hogg, *Constitutional Law of Canada*, 3rd ed., Toronto, Carswell, 1992, at p. 168). In *R.* v. *Lippé*, [1991] 2 S.C.R. 114, at p. 139,

Lamer C.J., speaking for a unanimous Court on this point, referred to independence and impartiality in the following terms:

> *The overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality; judicial independence is but a "means" to this "end". If judges could be perceived as "impartial" without judicial "independence", the requirement of "independence" would be unnecessary. However, judicial independence is critical to the public's perception of impartiality. Independence is the cornerstone, a necessary prerequisite, for judicial impartiality.*

(See also, to the same effect, *MacKeigan* v. *Hickman*, [1989] 2 S.C.R. 796, at p. 826; *Ruffo* v. *Conseil de la magistrature*, [1995] 4 S.C.R. 267, at p. 296.) In an article entitled "*La jurisprudence relative à l'indépendance judiciaire au Canada, depuis l'arrêt 'Valente*" (1995), *R. du B.* 313, at p. 320, Professor Gilles Pépin commented as follows on the above passage from *Lippé*:

> *In short, judges must be independent because if they are not, they are not judges. Judges render judgments; they do not provide services. The purpose of independence is to ensure not that they are comfortable, but that they are impartial in the execution of their office. A judge who is not impartial is not a judge. The objective of independence is to ensure impartiality, without which, if I may say so, litigants would have no need of judges.*

In light of this analysis, it seems unthinkable that a judge would, after serious thought, make the remarks about women made by Mr. Justice Bienvenue in a sentence, repeat them the following day in the media, make a late, rather meaningless apology to "*all women who may have been shocked or offended by [his] statements . . .*" and, finally, restate before this Committee, and expand on, the statements the judge had already made. We therefore find that Mr. Justice Jean Bienvenue was

guilty of misconduct and placed himself in a position incompatible with the due execution of the office of judge, thus violating paragraphs 65(2)(*b*) and (*d*) of the *Judges Act*.

The seriousness of these violations is such that the second question about whether the judge is capable of duly executing his office should now be answered.

Capacity or ability to duly execute the office of judge

To begin with, all of the incidents adduced in evidence should be considered.

In addition to his remarks about women in the sentence, Mr. Justice Bienvenue made inappropriate and even humiliating comments about women during incidents that were not all of equal importance:

(i) Whatever the judge's intention--apparently to "cheer up" a juror--the comment "*Kleenex is a woman's best friend*" could very likely have been perceived as a gender-based stereotype. Counsel for the accused seems to have seen it as such:

> *It is a comment about women crying, but I can't repeat the observation he made word for word, it was something like: "women cry more easily" or some such thing.*

(ii) We cannot accept the judge's assertion that a concern for judicial decorum lay behind his comments to Valérie Lesage. The reference to the reporter's physical appearance and attire was clearly out of place.

(iii) We did not consider it necessary to resolve the contradictions between the testimony of Mr. Justice Bienvenue and the crier. In our view, it was highly inappropriate for a judge to talk with an officer of the court--by the judge's own account--about the accused's colour and sexual orientation and the sexual orientation of a friend who had given her a cushion.

We cannot help but recognize that Mr. Justice Bienvenue has shown an almost complete lack of sensitivity to the communities and individuals offended by his remarks:

(i) He obviously does not understand or acknowledge women's reaction to his remarks..

(ii) Although the judge was aware of the Jewish community's reaction to his comments about the victims of Auschwitz, that reaction came as a great surprise to him. As we have said, the judge stood by his remarks the day after the sentence when he was interviewed on television. Stating that millions of Jews were eliminated without pain and died without suffering in the gas chambers seems to us, to say the least, to show a blatant lack of judgment. On this point as well, Mr. Justice Bienvenue does not acknowledge that his statement was wrong and, apart from an apology, merely admits "*the inappropriateness of the analogy*".

(iii) The judge is not concerned about the backlash that his remarks have had among suicidal persons and suicide prevention workers.

(iv) The judge has not shown any concern about the shock he gave the jurors. Seemingly unable to understand the complaint against him, he repeated that he did not ask for the door of the jury room to be closed and that the next day he publicly restated his criticisms of the verdict in court.

Mr. Justice Bienvenue misused the office of judge when he used it to express his personal beliefs about women, Holocaust victims and suicidal persons and to criticize the jurors. Further evidence of this is the judge's disdainful and arrogant behaviour towards the parking lot attendant.

Counsel for Mr. Justice Bienvenue argued that mere errors in judgment or strong language cannot justify removing a judge. Such errors or mistakes are generally minor and are acknowledged by the judge in question, who immediately regrets them. Like anyone else, a judge can have a bad day. In this case, the breaches of ethics brought to our attention--the judge's repeated remarks about women and the comments he made to the jurors after their verdict--are serious and, as with the other incidents alleged against him, have not been retracted by him. We are therefore not dealing here merely with strong language.

In our opinion, it is not appropriate to examine Mr. Justice Bienvenue's conduct according to the distinction established in American jurisprudence between the concepts of "wilful misconduct" and "prejudicial misconduct" since Canadian law does not make such distinction.

We wish to point out that the role of ensuring compliance with judicial ethics does not have the effect of undermining the principle of judicial independence. Professor H. Patrick Glenn put this aptly in his article "*Indépendance et déontologie judiciaires*" (1995), *R. du B.* 295, at p. 303:

> *The concepts of judicial independence and ethics are interdependent. Without ethics, there is no justification for independence. Without independence, ethics is now not enough. They are both essential and mutually reinforcing.*
>
> (Emphasis added.)

Judges have complete liberty to decide the cases that come before them. Dickson C.J. summarized the essence of judicial independence as follows in *R.* v. *Beauregard*, [1986] 2 S.C.R. 56, at p. 69:

> *Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider--be it government, pressure group, individual or even another judge--should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.*

Judges do not have to be popular. They simply have to dispense justice, free of any outside interference or influence. In *R.* v. *Généreux*, [1992] 1 S.C.R. 259, at pp. 283-84, Lamer C.J. described the guarantee that judicial independence confers on the courts as follows:

> *The independence of a tribunal is a matter of its status. The status of a tribunal must guarantee not only its freedom from interference by the executive and legislative branches of government but also by any other external force, such as business or corporate interests or other pressure groups.*

The mandate of a disciplinary authority is to ensure compliance with judicial ethics in order to preserve "*the integrity of the judiciary*", as Gonthier J. put it in *Ruffo*, *supra*, at p. 309. Gonthier J. added the following with respect to a disciplinary committee similar to this one:

> *Its role is remedial and relates to the judiciary rather than the judge affected by a sanction.*
>
> (Emphasis in original.)

It is this task, a very onerous one, that we must perform.

To attempt to show that Mr. Justice Bienvenue's remarks did not have a significant impact on the image of the judiciary in Quebec, his counsel sought, when the inquiry was reopened, to file a report on a poll he had commissioned in April 1996. The independent counsel objected to the document being filed, primarily on the ground that the questions asked of the people interviewed were within the Committee's jurisdiction.

The evidence about the notoriety of the judge's remarks is relevant and admissible: in April 1996, 75% of respondents said they were aware of the remarks made by Mr. Justice Bienvenue on December 7 during Tracy Théberge's trial. We consider the poll's other findings inadmissible. Under the Act, this Committee is responsible for assessing the judge's conduct. Moreover, it would be unwise, to use the term used by Lamer J. (as he then was) in *R.* v. *Collins*, [1987] 1 S.C.R. 265, at p. 282, to take public opinion polls into account in assessing the public's perception of a judge's conduct or of confidence in the judicial system. In *Collins*,

Lamer J., addressing the question of when the administration of justice is brought into disrepute under subsection 24(2) of the *Charter*, stated the following at pp. 281-82:

> *The concept of disrepute necessarily involves some element of community views, and the determinarion of disrepute thus requires the judge to refer to what he conceives to be the views of the community at large. This does not mean that evidence of the public's perception of the repute of the administration of justice, which Professor Gibson suggested could be presented in the form of public opinion polls (supra, pp. 236-47), will be determinative of the issue (see Therens, supra, pp. 653-54). The position is different with respect to obscenity, for example, where the court must assess the level of tolerance of the community, whether or not it is reasonable, and may consider public opinion polls (R. v. Prairie Schooner News Ltd. and Powers (1970), 1 C.C.C. (2d) 251 (Man. C.A.), at p. 266, cited in Towne Cinema Theatres Ltd. v. The Queen, [1985] 1 S.C.R. 494, at p. 513). It would be unwise, in my respectful view, to adopt a similar attitude with respect to the Charter.*
>
> . . .
>
> *The approach I adopt may be put figuratively in terms of the reasonable person test proposed by Professor Yves-Marie Morissette in his article "The Exclusion of Evidence under the Canadian Charter of Rights and Freedoms: What to Do and What Not to Do" (1984), 29 McGill L.J. 521, at p. 538. In applying s. 24(2), he suggested that the relevant question is: "Would the admission of the evidence bring the administration of justice into disrepute in the eyes of a reasonable man, dispassionate and fully apprised of the circumstances of the case?" The reasonable person is usually the average person in the community, but only when that community's current mood is reasonable.*
>
> (Emphasis added.)

In our view, the destruction of public confidence in a judge necessarily reflects on the judicial system as a whole. Our decision to exclude the report's findings on this twofold issue is not at all prejudicial to Mr. Justice Bienvenue, since the poll did not give him any particular advantage in this regard.

To assess the destruction of public confidence in the judge and his capacity or ability to duly execute his office, we will use an objective standard, as the Committee of the Canadian Judicial Council did in the *Marshall* case. In this regard, it is well established that the test for judicial impartiality--individual or institutional--and independence is that set out by de Grandpré J. in *Committee for Justice and Liberty* v. *National Energy Board*, [1978] 1 S.C.R. 369, at p. 394. Gonthier J. referred to it in *Ruffo*, *supra*, at pp. 298-99:

> *In the same case [Lippé], it was established that the test for institutional impartiality should be that set out by de Grandpré J. in Committee for Justice and Liberty, supra, at p. 394:*
>
> *. . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically--and having thought the matter through--conclude". . . . [Emphasis added.]*
>
> . . .
>
> *Since Committee for Justice and Liberty, this test has been applied consistently by this Court. . . .*

In *Généreux*, Lamer C.J. added the following at p. 287, referring to *Valente*, *supra*, which had applied the same test:

> *The appropriate question is whether the tribunal, from the objective standpoint of a reasonable and informed person, will be perceived as enjoying the essential conditions of independence.*
>
> (Emphasis added.)

It was not lightheartedly that we assumed the responsibility of reviewing the conduct of an individual who has been a judge for almost 20 years and whose integrity has not been questioned, or the responsibility of making a recommendation to the Canadian Judicial Council.

Recommendation

If the judge's meeting with the jury after the verdict had been an isolated occurrence, we would merely have expressed our disapproval of this violation of paragraphs 65(2)(*b*) and (*c*) of the Act, on the assumption that such an occurrence would not happen again. The judge's remarks about women and his deep-seated ideas behind those remarks legitimately cast doubt on his impartiality in the execution of his judicial office. Yet impartiality is the essence of the office of judge. Accordingly, this violation led us to conduct a further analysis to determine whether Mr. Justice Bienvenue had become incapacitated or disabled from the due execution of the office of judge.

That analysis required us to review all the incidents that marked Tracy Théberge's trial or occurred after that trial. We also particularly took account of Mr. Justice Bienvenue's testimony at the inquiry. We find that the judge has shown an aggravating lack of sensitivity to the communities and individuals offended by his remarks or conduct. In addition--the evidence could not be any clearer--Mr. Justice Bienvenue does not intend to change his behaviour in any way.

Because of his conduct during all the incidents that marked Tracy Théberge's trial, Mr. Justice Bienvenue has undermined public confidence in him and strongly contributed to destroying public confidence in the judicial system. In our view, this is the conclusion that would be reached by a reasonable and informed person.

Combining the test used by the Committee of the Canadian Judicial Council in the *Marshall* case and that applied by the Supreme Court to assess judicial impartiality and independence, we believe that if Mr. Justice Bienvenue were to preside over a case, a reasonable and informed person, viewing the matter realistically and practically--and having thought the matter through--would have a reasonable apprehension that the judge would not execute his office with the objectivity, impartiality and independence that the public is entitled to expect from a judge.

We are therefore of the opinion that Mr. Justice Jean Bienvenue has breached the duty of good behaviour under section 99 of the *Constitution Act, 1867* and has

become incapacitated or disabled from the due execution of the office of judge for the reasons set out in paragraphs 65(2)(*b*), (*c*) and (*d*) of the *Judges Act*:

- having been guilty of misconduct,
- having failed in the due execution of that office,
- having been placed, by his conduct, in a position incompatible with the due execution of that office,

and we recommend that he be removed from office.

JUNE 25, 1996

Pierre A. Michaud, Chairman

Joseph Z. Daigle, Committee Member

Paule Gauthier, Committee Member

Nathalie Des Rosiers, Committee Member

REASONS OF CHIEF JUDGE J.-CLAUDE COUTURE

I have read the reasons of my colleagues on this Inquiry Committee (hereinafter the *Committee*) and I am satisfied that the facts as recited therein accurately reflect the evidence presented by the various witnesses. I disagree with them, however, about the import of certain evidence and how it should be assessed. I do not intend to analyse the evidence in detail in these reasons, but will simply focus on certain elements of this evidence and on the principles of judicial independence established by the courts and the authors, upon which my own conclusion is based.

Mr. Justice Bienvenue is 67 years old. He was called to the Bar in 1952 and worked for the Crown for several years. He was a member of the National Assembly from 1966 to 1976 and, starting in 1971, was Minister of State (Finance), Minister of Immigration and Minister of Education of Quebec.

He was appointed to the Superior Court of Quebec in 1977 and elected to become a supernumerary judge in 1994. Since his appointment, Mr. Justice Bienvenue has sat on the Civil Division for 6 years and the Criminal Division for 12 years. While on the Criminal Division, according to his own testimony, he has presided over 16 first degree murder trials,

30 second degree murder trials, 24 manslaughter and attempted murder trials and 42 trials for various *Criminal Code* offences. His career has, in my opinion, been very impressive.

No evidence was submitted to the *Committee* showing that, during his career prior to the *Théberge* trial, Mr. Justice Bienvenue ever did anything incompatible with the conduct of a judge, whether through his behaviour or actions, or ever displayed sexist or anti-Semitic attitudes in his writing or speech, as claimed by certain persons who filed complaints against him with the *Canadian Judicial Council* (hereinafter the *Council*).

In the absence of any such evidence, I find it very difficult to accept that when sentencing the accused in the *Théberge* case, Mr. Justice Bienvenue suddenly became imbued with sexist and anti-Semitic opinions or that he deliberately intended through his remarks to denigrate women in general and to maliciously attack the Jewish community.

In sentencing the accused in the *Théberge* case on December 7, 1995, Mr. Justice Bienvenue made the following remarks, about which complaints have been made against him:

[TRANSLATION]

> *It has always been said, and correctly so, that when women--whom I have always considered the noblest beings in creation and the noblest of two sexes of the human*

race--it is said that when women ascend the scale of virtues, they reach higher than men, and I have always believed this. But it is also said, and this too I believe, that when they decide to degrade themselves, they sink to depths to which even the vilest man could not sink.

Alas, you are indeed in the image of these women so famous in history. The Delilahs, the Salomes, Charlotte Tardif, Mata Hari and how many others who have been a sad part of our history and have debased the profile of women.

You are one of them, and you are the clearest living example of them that I have seen.

At the Auschwitz-Birkenau concentration camp in Poland, which I once visited horror-stricken, even the Nazis did not eliminate millions of Jews in a painful or bloody manner. They died in the gas chambers, without suffering.

In addition, witnesses at the hearing referred to certain other remarks that they said Mr. Justice Bienvenue had made during the trial and denounced the way he had behaved in certain circumstances. It should be added that those remarks, and the alleged conduct, were not mentioned in the complaints filed with the *Council* although they did fall under the

Committee's terms of reference. This part of the evidence is clearly described in the reasons for the majority decision.

The question that the *Committee* must answer was set out very clearly in the following terms by L.-Yves Fortier, C.C., Q.C., who served as independent counsel, in his oral submissions:

[TRANSLATION]

> *I respectfully submit to you that it is only by considering all the aspects of Mr. Justice Bienvenue's conduct in the Théberge trial that we have adduced in evidence that you can form an enlightened opinion on the crucial issue before you. You may conclude that none of the grounds considered separately would entitle you to come to the very harsh conclusion contemplated by subsection 65(2) of the Act. However--and I come here to the "reasonable person" tests mentioned by Lamer J. in the judgment reproduced at pages 46 and 47 of my factum--is it not reasonable to conclude that public confidence in the impartiality and integrity of the judicial role has been undermined or eroded by all the misconduct alleged against the Honourable Jean Bienvenue, such that he has now become incapacitated or disabled from executing the office of judge?*

To these submissions by the learned counsel, I would add that the application of subsection 65(2) of the *Judges Act* is subordinate first and foremost to the concept of judicial independence. Before reaching any conclusion in a situation like the one with which we are concerned, it must first be ensured that it meets the standards applicable to that doctrine, as established by the courts or authors.

As far as Mr. Justice Bienvenue's remarks about women and Jews are concerned, I am of the opinion that, in light of the evidence we must assess, the case law and the opinions of authors who have considered this issue, those remarks cannot amount to misbehaviour by Mr. Justice Bienvenue under section 99 of the *Constitution Act, 1867*.

Accordingly, if my opinion about the remarks in question is correct, it follows that in the circumstances the other grounds for complaint disclosed during the hearing cannot in themselves lead to the conclusion that the judge was guilty of misbehaviour. For example, telling a female juror that [TRANSLATION] "Kleenex is a woman's best friend" or telling the jury that he did not agree with its verdict does not, in my view, amount to misbehaviour on his part. It would obviously have been much better if he had not made those remarks. The grounds for complaint in this regard, whether considered separately or together, are not such as to warrant a recommendation of removal, although they were inappropriate for a judge. The combination of a number of such grounds cannot lead to a conclusion that the judge was

guilty of misbehaviour, in the same way that a number of violations of a municipal by-law cannot make a person guilty of criminal offence.

The evidence in the *Théberge* trial showed that Simon Messier, a veterinarian, and his wife, Tracy Théberge, a nursing student, were living separate and apart. Ms. Théberge apparently invited her husband to her home on the pretext that he had to sign some documents concerning their separation. When Mr. Messier was seated in the dwelling, the accused cut his carotid artery with a razor blade. Mr. Messier bled to death a few minutes later.

After a five-week trial, the jury deliberated for 15 hours and returned a verdict of guilty of second degree murder. It recommended that Ms. Théberge serve 10 years, the minimum time, before being eligible for parole. On December 7, 1995, Mr. Justice Bienvenue sentenced the accused to imprisonment for life with eligibility for parole after 14 years.

The print and broadcast media reported on the sentence, focusing especially on the judge's remarks about women and Jews. In their commentary on the judge's remarks about women, the media reported only the second part of what he had said, entirely omitting the beginning of his remarks, where he praised women.

The reaction to the remarks was spontaneous and acerbic, at least in some circles.

With respect to the comments on the Auschwitz-Birkenau concentration camp, Jack Jedwab, Executive Director of the Canadian Jewish Congress, answered the questions put to him by the independent counsel as follows:

[TRANSLATION]

Q. But what did you do when you learned of that statement?

A. A number of things. First, I answered the calls I received from the media about our reaction to the comments that had been made, or at least the comments as they were reported by the media.

As is my custom, I tried to clarify the remarks--in other words, I'm not . . . I don't always go by what's said in the media, with all due respect to our media colleagues--and to verify exactly what was or wasn't said. After that, I responded to the comments, statements or . . . excuse me, questions from the media by denouncing the remarks.

But at the same time, I took the trouble to call Mr. Justice Bienvenue because I thought it was the duty of the Canadian Jewish Congress not only to denounce or say we disagreed but to understand more clearly why the statement was made.

So I took the trouble to call Mr. Justice Bienvenue, who. . . .

Q. Were you able to reach him?

A. Yes, I was. . . .

Q. Yes, it was the following day?

A. He took the call.

Q. Was it December eighth?

A. It was a Friday.

Q. It was December eighth, Mr. Chairman.

A. And we had a good conversation.

I don't think we spoke very long. The judge tried to explain the context in which he'd made the comments.

I realized or I felt, during the conversation, that in my opinion the judge was not someone who bore any ill will.

So I proposed the idea of a meeting between the judge and the leaders of the Canadian Jewish Congress, as well as the president and director of the Holocaust Memorial Centre, inasmuch as those in charge of that organization, with whom I was in contact, were very much affected by the remarks as reported in the media.

And we organized that meeting for . . . we proposed that the meeting take place on Tuesday . . . December 8, ninth (9th). . . .

Q. Eleventh (11th), twelfth (12th).

A. Of December, yes.

Mr. Justice Bienvenue travelled from Quebec City to Montreal to meet with the representatives of these Jewish organizations. Mr. Justice Bienvenue, Mr. Jedwab, Ms. Hershorn, Ms. Teitelbaum, Mr. Sultan, Rabbi Poupko, Mr. Bleyer and Mr. Circus were present.

At the hearing, Mr. Justice Bienvenue explained his meeting with them.

He answered a question by his counsel, Gabriel Lapointe, Q.C., as follows:

[TRANSLATION]

Q. First of all, if you think it necessary, I would like you to give us an explanation of your comments on the victims of the Auschwitz-Birkenau gas chambers.

A. Yes.

I made those comments during two (2) long hours at the Quebec-Canadian Jewish Congress, whose representatives have their offices in Montreal, their premises in Montreal. I made them during a very civilized, constructive, useful meeting, in which those individuals, in a great spirit of tolerance and without being biased

against or prejudging me, welcomed me and listened to what I had to say on the subject.

And what I told them--and, in fact, it wasn't very hard for me to explain it to them--was what I was thinking at the time I made those remarks.

I wanted, through those remarks, to emphasize the physical cruelty involved in Simon Messier's death.

Following that meeting, a news release drafted jointly by the representatives of the Jewish organizations and Mr. Justice Bienvenue was issued in which the latter recognized that his comments had been inappropriate and apologized for them. It read as follows:

[TRANSLATION]

After a cordial meeting between Canadian Jewish Congress officials, representatives of the Holocaust Memorial Centre and myself, I would like to state the following: first, I sincerely regret the pain that my comments caused last week, particularly to Holocaust survivors. As is generally recognized by everyone, the horrors of the Holocaust are unparalleled in human history. That is why I recognize the inappropriateness of the analogy I drew with the Holocaust to illustrate a situation I

perceived as extreme. I would also like to apologize to everyone who felt offended by that analogy.

[TRANSLATION]

Mr. Jedwab admitted the following in response to a question by Mr. Lapointe:

Q. Just a few questions, Mr. Jedwab.

Following the meeting you had with the individuals you have named and Mr. Justice Bienvenue, isn't it true that, as the result of the whole matter, you came to the conclusion that there was no malice in Mr. Justice Bienvenue's remarks about the victims of the concentration camps?

A. Yes, I don't have the impression that Mr. Justice Bienvenue's intentions were malicious.

A. O.K.

And you didn't see any evidence of anti-Semitism in his conduct either, is that correct?

A. Yes, I didn't get the impression that Mr. Justice Bienvenue's attitude or approach was in any way anti-Semitic.

As for the reaction that occurred to the judge's comments on women, it resulted in many letters being sent to the *Council*. A number were written by individuals or groups. A large number were in the form of identical circular letters written on a group's letterhead and signed by some of its members. They all came from the province of Quebec. Diane Lemieux, co-ordinator and spokesperson for the Regroupement québécois des centres d'aide et de lutte contre les agressions à caractère sexuel (CALACS), and Françoise David, president of the Fédération des femmes du Québec, who described that federation as a non-partisan pressure group, testified before the *Committee*.

When asked by the independent counsel about her own reaction upon learning of Mr. Justice Bienvenue's comments about women, Ms. Lemieux answered as follows:

[TRANSLATION]

A. Um . . . I would say extremely surprised, because . . . um . . . the comments were so unqualified, so clichéd, that I was . . . um . . . I was astonished.

I wanted to see, to hear the statement.

I wanted to be sure that all of it had actually been said.

So my reaction was surprise and also, I'd say, a certain discouragement.

We work very hard--both I personally and my colleagues--to try to build women's confidence in the justice system.

So the feeling was kind of like: oh no! something else that's going to be an obstacle to that search for confidence.

So surprise and discouragement, therefore.

She explained that following a meeting with Ms. David and one Louise Riendeau, co-ordinator of the Regroupement provincial des maisons d'hébergement et de transition pour femmes victimes de violence conjugale, she drafted a letter that she submitted to her two colleagues for their approval. The letter was eventually sent to the *Council* on December 19, bearing all three signatures.

Mr. Justice Bienvenue tried to contact Ms. David by telephone but was unable to reach her and left her a message on an answering machine.

When she returned to her office, Ms. David heard the message that Mr. Justice Bienvenue had left for her, which stated that he was going to issue a statement shortly and was prepared to meet with them beforehand if they wished. Ms. David did not consider it appropriate to accept that invitation.

On December 15, 1995, Mr. Justice Bienvenue made the following statement:

[TRANSLATION]

First of all, I want to apologize to all women who may have been shocked or offended by my statements and I hope that they will accept my apology.

The comments I made when rendering judgment were in no way intended to belittle women, quite the contrary. I tried, albeit in an inappropriate way, to show how shocking and horrible I considered the crime committed by the accused.

Those who have been firsthand witnesses to the justice I have administered for many years know how I have done so and how much respect my judgments have shown for women.

Ms. David acknowledged that she had read this statement and answered a question by the independent counsel as follows:

[TRANSLATION]

> *That type of apology, which is not based on in-depth consideration of the matter, leads us to think--and the fact that it was late also leads us to think--that it isn't serious and, in short, that it doesn't diminish the gravity of the judge's remarks.*

Therefore, she preferred to pass judgment on Mr. Justice Bienvenue without even giving him a chance to explain.

It must be recognized that some written comments, spoken words and types of behaviour are reprehensible and blameworthy in themselves. They amount to misconduct on the part of those responsible for them. There are also others that cannot be characterized in such a way but are nevertheless considered unacceptable and even insulting in some circles or by some individuals. This situation is not necessarily limited to judges, but when a judge is responsible, what test should be used to determine whether he or she has been guilty of misconduct?

Everyone knows that a person may intend something very definite when expressing an opinion but that the perception of the person's intentions by others may be completely different from, or even contrary to, what the person meant. Persons holding public office are all vulnerable to such reactions and heaven knows judges are not exempt in this regard.

The concept of judicial independence must take precedence over the values of individuals in their interaction with our judicial system. Judicial independence may not be eroded or its importance diluted for reasons involving private interests alone. Public protest against judges' judgments or actions is entirely normal and sometimes legitimate. In some situations, it is deserved, but often it is not. In many cases, it can be explained by the fact that the judge's intentions were misinterpreted, often because the judge's comments were reported out of context and therefore prompted public reaction. Whatever their motivation for such action, it is necessary to be careful when evaluating its influence on society as far as the perception of the judiciary is concerned. Without trying to excuse them, judges should not be required to be constantly on guard or to ensure that their remarks are acceptable to every sector of the population. Such an obligation would place a muzzle on the judiciary.

In the *Marshall* case, which was the subject of an inquiry by a committee (hereinafter the *Marshall Committee*) appointed by the *Council*, Chief Justice McEachern of British Columbia, in a judgment in which he said he agreed with the majority that no

recommendation should be made to remove the judges in question from office, stated the following about judicial independence:

> *There has never been any rule of law or practice limiting the right of a judge in court or in Reasons for Judgment from saying what he or she thinks should be said even though he or she may decide for any number of reasons not to criticize others who may also deserve critical mention. This freedom of judges to speak their minds has been recognized as one of the hallmarks of judicial independence and one of the prices society pays for the benefits of a judiciary which says what it thinks should be said.*

He added the following:

> *This judicial right is not a license for abuse. First, if a judge's criticism or comments indicate unfitness to discharge the judicial function then he or she faces inquiry and, in a proper case, removal from office.*

Finally, he stated the following:

> *I have no doubt some judges would not have made these comments. But if judges are expected to speak openly, directly and bluntly about matters that may be of public interest and importance, then we must be very careful indeed before we dilute that principle.*

The importance that courts and authors have attached to this doctrine over the centuries is well known. The *Act of Settlement, 1701* gave legislative confirmation to the custom recognizing judges' security of tenure, which dates back to 1688.

In his book *Judges on Trial* at p. 105, Shimon Shetreet quoted Lord John Russell, who said the following in the case of *Lord Abinger C.B.* (1843):[1]

> *Independence of judges is so sacred that nothing but the most imperious necessity should induce the House to adopt a course that might weaken their standing or endanger their authority.*

Shimon Shetreet continued as follows at p. 106, quoting Sir Winston Churchill:

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[1] A reference to the House of Commons for consideration of whether Lord Abinger should be removed from office (66 Parl. Deb., 3rd Ser., at 1124 (1843)).

The complete independence of the Judiciary . . . is the foundation of many things in our island life . . . It is perhaps one of the deepest gulfs between us and all forms of totalitarian rule . . . The British Judiciary with its tradition and record is one of the greatest living assets of our race and people and the independence of the Judiciary is part of our message to the ever-growing world which is rising so swiftly around us.

These statements were made by English jurists. The principle of judicial independence that emerges from them can also be found in Canadian case law.

Our courts have made many such statements and I will refer to a few of them.

In *The Queen* v. *Beauregard*, [1986] 2 S.C.R. 56, Dickson C.J. of the Supreme Court of Canada stated the following at p. 69:

Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider--be it government, pressure group, individual or even another judge--should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.

In a subsequent paragraph, he continues as follows:

> *In the words of a leading academic authority on judicial independence, Professor Shimon Shetreet: "The judiciary has developed from a dispute-resolution mechanism, to a significant social institution with an important constitutional role which participates along with other institutions in shaping the life of its community" ("The Emerging Transnational Jurisprudence on Judicial Independence: The IBA Standards and Montreal Declaration", in S. Shetreet and J. Deschênes (eds.), Judicial Independence: The Contemporary Debate (1985), at p. 393).*
> (Emphasis added.)

In *Valente* v. *The Queen*, [1985] 2 S.C.R. 673, at p. 694, Le Dain J. had already stated the following at p. 694:

> *Security of tenure, because of the importance that has traditionally been attached to it, must be regarded as the first of the essential conditions of judicial independence for purposes of s. 11(d) of the Charter.*

In view of the foregoing comments, it is clear that the doctrine of judicial independence occupies a major place in the values that have shaped our judicial system.

Accordingly, it is the essential element that must take precedence when it comes to determining whether a judge is capable of duly executing his or her office. It must therefore be asked whether the judge's conduct and remarks clearly exceeded the bounds of what is permitted by this doctrine.

In its report, the *Marshall Committee* formulated certain criteria with respect to removal that were accepted by the *Council*. To avoid distorting the meaning that the authors wished to give them, it is essential to reproduce them word for word, since they were formulated in the most recent example of a case in which the issue was whether the grounds for complaint against á judge made him or her unable to duly execute the office of judge.

The first criterion was expressed as follows:

> *First, it is accepted that the judicial role, involving as it does the requirement to make decisions free from external interference or influence, demands the independence of the judges. (S. Shetreet and J. Deschenes (eds), Judicial Independence: The Contemporary Debate (1985) at p. 393; cited with approval in the Queen v. Beauregard [1986] 2 S.C.R. 56 at 69-70, per Dickson C.J.). It is for this reason that British judges were first granted security of tenure during good behaviour in 1688, a security guaranteed by para. 99(1) of the Canadian Constitution, and regarded as*

"...the first of the essential conditions of judicial independence..." (Valente v. The Queen [1985] 2 S.C.R. 693 at 694 per Le Dain J.)

Judicial independence carries with it not merely the right to tenure during good behaviour, it encompasses, and indeed encourages, a corollary judicial duty to exercise and articulate independent thought in judgments free from fear of removal (Sirros v. Moore [1974] 3 W.L.R. 459 at 467, per Lord Denning M.R.). In consequence of this duty, judges are free to express their views of the cases before them in a forthright way.

The report stated the following about the second criterion:

Secondly, it is acknowledged that "the removal of a judge is not to be undertaken lightly" (Valente, supra at 697). The misconduct alleged and demonstrated must be of sufficient gravity to justify interference with the sanctity of judicial independence. In his classic work, Judges on Trial, Professor Shetreet defined the test when Parliament would interfere to remove a judge. He said at page 272:

Unless it can be attributed to improper motives or to a decay of mental power, a mistake in fact or in law or any error of judgment will not justify the interference of Parliament. These matters are within the province of the appellate courts; and Parliament will not assume the role of a court of appeal.

Thus this Inquiry Committee, which is the first step in the Canadian parliamentary process for removal of a judge does not function in this case as a court of appeal reviewing the findings of either the Reference Court or the Royal Commission.

The following was stated about the third criterion:

Thirdly, it is also acknowledged that judicial independence has attained entrenchment in our constitution not merely, or even mainly, for the benefit of the judiciary. It is also a fundamental benefit to the public served by the judiciary. (S. Shetreet, Judges on Trial 1976 at 276; Valente, supra at 172; MacKeigan v. Hickman supra 696 and 707). Public confidence in the independent and impartial administration of justice is, in effect, the first proposition in the syllogism which has as its second proposition the need for independent and impartial judges, and as its conclusion the independence of the judiciary. Any test which attempts to formulate

when the removal of a judge is appropriate must necessarily include and balance the public interest as well as judicial independence.

The *Marshall Committee* synthesized the application of these criteria in stating the following:

> *The test we would propose to apply, as applicable to this case, is an alloy of these many considerations and takes the following form:*
>
> > *Is the conduct alleged so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?*
> >
> > (Emphasis added.)

In my view, the authors of that report deliberately used the terms "manifestly" and "profoundly" because they wanted to show how important a role judicial independence plays in our judicial system and the extent to which it must be taken into consideration before concluding that a judge has become incapacitated or disabled from the due execution of the office of judge.

Moreover, in Canada, unlike in some other jurisdictions, the only penalty that exists for misconduct by a judge is removal. In my view, such a harsh measure cannot be recommended unless the judge has seriously and intentionally failed in the due execution of his or her office.

As I mentioned above, there is no evidence that Mr. Justice Bienvenue sought to intentionally insult women and Jews when he made the remarks in question. The remarks were unfortunate in the circumstances because they lent themselves to differing interpretations, as the facts have shown, and they added absolutely nothing to his sentence. They were badly received by a segment of the population, which is regrettable. Unfortunately, such a situation is not sufficient to recommend Mr. Justice Bienvenue's removal.

In his submissions at the start of the hearing, the independent counsel referred to the "*reasonable person*" concept proposed by Professor Yves-Marie Morissette in his article "*The Exclusion of Evidence under the Canadian Charter of Rights and Freedoms*" and adopted by Lamer J. in *R.* v. *Collins*, [1987] 1 S.C.R. 265. Although the reference to this concept was *obiter*, it expressed a point of view that had already been commented on by Professor Shetreet in the following terms:

> *Even if the statement of the principle of the public confidence test did not present much difficulty, its application in particular cases might give rise to many difficulties. Thus, who is to decide whether the capacity of the judge to exercise his judicial functions was seriously affected in the eyes of the public? What degree of public disquiet would justify a conclusion that public confidence in a judge was destroyed? Do press articles calling for the resignation of a judge suffice to reflect the loss of public confidence in the judge, or is it necessary for letters to the editors and to M.P.'s to urge action against the judge? And more, what weight should be attached to the opinion of the profession particularly when it is contrary to general opinion? Finally, there is no one 'public' but rather a series of publics; hence the question, who is the public whose confidence in the judiciary should be taken as the yardstick.*

It must not be forgotten that although a number of protest letters were written to the *Council* in this case, counsel for Mr. Justice Bienvenue also filed some fifteen letters expressing approval of and support for the judge.

The question that arises is what is the group of "reasonable persons" to which Lamer J. was referring? Is it those men and women who complained or those men and women who agree with Mr. Justice Bienvenue?

How can this situation be reconciled with the statement in the *Marshall Committee* report that public confidence must be sufficiently undermined? Can the definition of "*public*" in this context be limited to a regional reaction, given that Mr. Justice Bienvenue's conduct was reported and commented on by the media across the country?

On the basis of the foregoing, I am not satisfied that the evidence has shown that the conduct alleged against Mr. Justice Bienvenue was manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, as this test was formulated in the *Marshall Committee* report. I would also add that I consider the test defined by Professor Shetreet and adopted by the *Marshall Committee*, which concerns the existence of improper motives on the part of the judge against whom grounds for complaint have been raised, to be of paramount importance. In light of the evidence adduced, I am convinced that Mr. Justice Bienvenue never intended to insult or revile women and Jews.

For these reasons, I cannot agree with the conclusion that Mr. Justice Bienvenue has become incapacitated or disabled from the due execution of the office of judge.

Respectfully submitted,

Chief Judge J.-Claude Couture
Tax Court of Canada